United States Statement
64th UN General Assembly Sixth Committee – Agenda Item 81
Report of the International Law Commission on the Work of its 61st Session
Reservations to Treaties (Chapter V); Expulsion of Aliens (Chapter VI)

Thank you, Mr. Chairman. I would like to thank the Chairman of the Commission, Mr. Ernest Petric, for his introduction of the Commission's report. I would also like to thank the Special Rapporteurs for their important contributions to the Commission's study of these important topics. As noted in our earlier remarks on the Commission's report, the United States highly appreciates the significant contributions of the International Law Commission to the progressive development and codification of international law and commends the Commission on the quality of the report on its most recent work. I appreciate the opportunity to comment on the topics that are currently before the Committee.

Reservations

On the subject of Reservations to Treaties, I would first like to compliment the Special Rapporteur on the impressive work that has gone into the draft guidelines. We are grateful for the scholarship Mr. Pellet has brought to bear on this important topic and although, as has been mentioned before, the United States is skeptical regarding the utility of the formal framework adopted by the Commission for interpretative declarations, Mr. Pellet's Fourteenth Report was excellent and we are looking forward to his continuing inquiry into the validity of reservations and interpretative declarations.

On the subject of interpretative declarations, I would like to mention that we continue to have particular concerns regarding the suggested treatment of *conditional* interpretative declarations as reservations. If the content of a conditional interpretative declaration purports to modify the treaty's legal effects with regard to the declarant then it is a reservation. If the content of a conditional interpretative declaration merely clarifies a provision's meaning, then it cannot be a reservation, regardless of whether it is conditional. In brief, we disagree with the view that an interpretative declaration that would not otherwise qualify as a reservation, could be considered a reservation simply because the declarant makes its consent to be bound by the treaty subject to the proposed interpretation. Subjecting conditional interpretative declarations to a reservations framework, regardless of whether they are in fact reservations, is inappropriate and could lead to overly restrictive treatment of such issues as temporal limits for formulation, conditions of form, and subsequent reactions regarding such declarations.

On the subject of the validity of reservations, the Special Rapporteur's Report regarding the meeting between the Commission and representatives of the United Nations human rights treaty bodies and regional human rights bodies was of particular interest. We would associate ourselves with the consensus views expressed at this meeting regarding the fact that there is value in the uniform application of rules regarding reservations for all types of treaties and that no special regime is applicable to reservations to human rights treaties.

The discussion by the Commission regarding the role of treaty bodies in examining reservations was also of particular interest. It is a fundamental and long-standing principle of customary

international law that treaties are authoritatively interpreted by the Parties themselves, though of course the treaty may be authoritatively interpreted by an international body if and to the extent that the Parties have agreed either in the treaty at issue or through a separate agreement. In our view, the current guidelines properly reflect that any conclusions formulated by a treaty body regarding a particular reservation can only "have the same legal effect as that deriving from the performance" of its duties as established in the treaty itself.

Finally, with respect to the legal effect of invalid reservations, we do not think that if a State has made a prohibited reservation, it is then bound by the treaty without the benefit of that reservation. As treaty law is premised on the voluntary undertaking of treaty obligations, an attempt to assign an obligation expressly not undertaken by a country is inconsistent with that fundamental principle. Instead, the objecting State must determine if it is desirable to remain in a treaty relationship with the reserving State, despite the existence of what it considers to be an impermissible reservation. Alternatively, if the objecting state rejects a treaty relationship with the reserving state on the basis of the objectionable reservation, the reserving state can always withdraw its reservation. From a practical perspective, there are times when it may be better to continue to have a treaty relationship with a State, despite the existence of an impermissible reservation. While this is not an ideal scenario, it is important not to rule this out. We look forward to a continuing dialogue on these important issues.

Expulsion of Aliens

The United States would like to express its appreciation for the continued efforts of Special Rapporteur Kamto on the topic of Expulsion of Aliens. The issues addressed by the Rapporteur are complicated ones and we encourage the Rapporteur and other members of the Commission as well as other States to carefully review the draft articles concerning the human rights of aliens subject to expulsion. As the scope of this project continues to expand, our concerns about the possibility that these draft articles could unduly restrain the sovereign rights enjoyed by States to control admission to their territories and to enforce their immigration laws are even more acute. Today I would like to highlight a few issues that demonstrate the need for careful attention to these draft articles.

As a preliminary matter, we would like to highlight an issue regarding methodology and the appropriate sources of international law. We would hope that rather than attempting to articulate new rights specific to the expulsion context and importing concepts from regional jurisprudence (e.g., from the European Commission and Court), reference would be made instead to well-settled principles of law reflected in the precise text of broadly ratified global (i.e., U.N.) human rights conventions.

Additionally, these new draft articles on human rights highlight the need to further refine the scope of these draft articles. We have previously emphasized the need to clarify that decisions to deny entry do not properly fall within the scope of these draft articles, and that they should not apply to matters governed by specialized bodies of law such as extraditions or other transfers for law enforcement purposes or to expulsions of aliens in situations of armed conflict. For example, extradition must be excluded from the scope of the draft articles; extradition is not expulsion, but the transfer of an individual – both aliens and nationals – for a specific law

enforcement purpose. Far from codifying rules of customary international law in this area, many of the proposals would purport to amend the settled practices and obligations of States under multilateral and bilateral extradition treaty regimes. Additionally, it appears that more thought is needed as to how these rules would apply in the situation of an armed conflict.

We have further concerns about the scope of the draft articles regarding the rights of persons who have been expelled. In our view, as a general matter and consistent with the framework adopted in international human rights treaties, these draft articles should apply to individuals within the territory of a State who are subject to a State's jurisdiction. States should not be placed in the situation of being responsible for anticipating conduct by third parties that is beyond their forseeability or control.

Regarding draft article 10, while we of course recognize the importance of including a non-discrimination principle in these draft articles, it should be clear that it applies only to the process afforded to aliens in expulsion proceedings, and should not unduly restrain the discretion enjoyed by States as a result of their sovereign rights to control admission to their territories and to establish grounds for expulsions of aliens under their immigration laws.

Regarding concerns over family unity, the draft article on this subject appears to be based on the emerging jurisprudence of the European Court. In this area and elsewhere we would recommend referring instead to the text of the International Covenant on Civil and Political Rights as well as to state practice to determine how to articulate the scope of the obligations of States.

Finally, we are particularly troubled by Mr. Kamto's incorporation of non-refoulement obligations into numerous provisions, both indirectly by, as previously noted, extending protections to "persons who have been … expelled" in the various provisions and explicitly in draft articles 14 and 15. The Special Rapporteur relies on non-binding opinions of the Human Rights Committee and jurisprudence of the European Court of Human Rights to interpret a non-refoulement obligation and a requirement for assurances against the death penalty into rights where none is expressly provided in the actual texts of Article 6 and 7 of the International Covenant on Civil and Political Rights or any other U.N. convention. Moreover, we are concerned about the proposed obligation in draft article 14 regarding ensuring respect for the "personal liberty in the receiving State" as this term is undefined and goes beyond existing obligations regarding non-refoulement assumed by States as parties to global (i.e., U.N.) conventions. Finally, draft article 15(2)'s extension of the non-refoulement protection to protect against risks "emanat[ing] from persons or groups of persons acting in a private capacity" goes far beyond even the express non-refoulement protection regarding torture contained in Article 3 of the CAT.

We appreciate the opportunity to provide these comments.

Thank you, Mr. Chairman.